

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

ANR Pipeline Company

Docket Nos. RP99-301-079 and
GT01-25-005

ORDER ON REHEARING AND CLARIFICATION

(Issued October 24, 2003)

1. On June 23, 2003, ANR Pipeline Company filed a request for clarification, or in the alternative rehearing, of certain aspects of the Commission's May 23, 2003 "Order on Compliance Filing and Rehearing" (May 23 Order).¹ In that order, the Commission substantially rejected the explanations ANR gave in its compliance filing concerning the maximum daily quantity (MDQ) adjustment and primary point change provisions in certain negotiated rate contracts. The Commission also denied rehearing in part, and granted rehearing in part of other issues raised by the parties. As discussed below, the Commission grants rehearing of ANR's request concerning negotiated rate agreements containing MDQ adjustment provisions reflecting changes in fuel use percentage but denies rehearing of the request concerning the MDQ adjustment provisions that accommodate capacity on an interconnecting pipeline. However, we clarify that ANR need not eliminate the contractual ROFR from contracts because absent the contractual provision, certain shippers would not be eligible for a ROFR.

2. In addition, on June 20, 2003, the Wisconsin Public Service Corporation (WPSC) filed a letter stating that the May 23 Order did not acknowledge its August 2, 2001 request for rehearing, therefore, the rehearing request remains pending. Below, the Commission finds that, contrary to WPSC's assertion, each argument raised by WPSC in its request for rehearing has been addressed in prior Commission orders.

3. We find that our decision benefits the public because it clarifies issues and grants rehearing of matters consistent with our negotiated rate policy.

¹ ANR Pipeline Company, 103 FERC ¶ 61,223 (2003).

I. Background

4. In ANR's negotiated rate proceedings, ANR sought approval of service agreements entered into with several shippers, including negotiated rate agreements with WPSC. As here relevant, the agreements with a number of the shippers gave a contractual ROFR, despite the fact that the shipper would otherwise be eligible for this right under Section 22.2 of the General Terms and Conditions (GT&C) of ANR's FERC Gas Tariff as it was then in effect. In addition, the agreements with WPSC included provisions: (1) giving WPSC the unilateral option to increase or reduce its MDQ, (2) allowing WPSC to change its primary receipt points subject to various conditions or to redistribute MDQ levels among a specified group of agreements, (3) providing that, under certain conditions, ANR would not seek reimbursement from WPSC if a replacement shipper to whom it had released capacity defaulted on the payment, (4) allowing WPSC to receive any enhanced or improved services implemented during the term of the agreements, and (5) permitting adjustments to MDQ among agreements to account for increases and decreases in ANR's in-kind fuel charges so that WPSC can fully utilize its transportation capacity on Viking Gas Transmission Co. (Viking).

5. On July 3, 2001, the Commission issued letter orders in these proceedings which accepted and suspended the filings to be effective as requested, subject to conditions.² The Commission determined that the above described provisions are not in ANR's *pro forma* service agreement, applicable rate schedules, or generally applicable tariffs and that those provisions are therefore material deviations. Therefore, the Commission directed ANR to demonstrate why it could not offer these provisions pursuant to generally applicable tariff provisions. In the alternative, the Commission directed ANR to file revised agreements without the non-conforming provisions. In addition, the Commission directed ANR to explain why it agreed to provide certain shippers with a contractual ROFR, when it appeared the shipper would be eligible for this right under Section 22.2 of the GT&C as then in effect.³

6. On August 2, 2001, ANR sought rehearing of the July 3, 2001 Orders. WPSC also sought rehearing of the July 3, 2001 Order in Docket No. RP99-301-016 involving its

² See ANR Pipeline Co., 96 FERC ¶ 61,013 (2000); 96 FERC ¶ 61,014 (2000); 96FERC ¶ 61,015 (2000); 96 FERC ¶ 61,016 (2000) and 96 FERC ¶ 61,017 (2000).

³ The Commission also directed ANR to explain why the agreements with WPSC do not contain a Section 9, Operational Flow Orders (OFO) that ANR included in its *pro forma* service agreement. ANR explained that the agreement do not have an OFO provision because the Commission accepted ANR's proposed deletion of Section 9 from its *pro forma* service agreement in Docket No. RP01-467-000. We accepted this explanation and granted rehearing. See 103 FERC ¶ 61,223 at 61,853 (2003).

negotiated rate agreements with ANR, raising essentially the same issues ANR raised in its rehearing request. The May 23 Order denied ANR's rehearing request in part and granted rehearing in part, but did not mention WPSC's rehearing request. The May 23 Order also accepted, subject to conditions, ANR's compliance filing submitted to comply with the July 3, 2001 Order.

7. On June 20, 2003, WPSC filed a letter, asserting that, since the May 23 Order did not mention its request for rehearing of the July 3, 2001 Order, its August 2, 2001 rehearing request remains pending before the Commission because it argues the Commission did not address the issues it raised. On June 23, 2003, ANR filed a request for clarification and/or rehearing of certain aspects of the May 23 Order. ANR seeks clarification that a provision is acceptable which is in certain WPSC contracts, allowing WPSC to adjust its MDQ to reflect changes in ANR's fuel use percentages (which appears in two storage contracts⁴ and six transportation contracts).⁵ Next, concerning the ROFR provision, ANR asks the Commission to clarify that ANR can maintain the contractual ROFR in certain agreements. ANR states that, but for this contractual provision, these agreements would not be eligible for the ROFR under ANR's current tariff because they are either negotiated rate agreements or are discounted recourse rate agreements.

II. Discussion

8. For the reasons discussed below, we grant in part and deny in part ANR's and WPSC's requests for rehearing. We also clarify that ANR need not eliminate the contractual ROFR from contracts that would not be eligible for a ROFR pursuant to its tariff absent the contractual provision.

A. ANR's Rehearing Request

1. MDQ Adjustment Reflecting Changes in Fuel Use Percentage

9. Among the contracts addressed by the May 23 Order were several contracts between ANR and WPSC. Some of those contracts are for storage service pursuant to Rate Schedule FSS and others are for transportation service pursuant to Rate Schedule ETS. As discussed in more detail below, these contracts contain provisions allowing WPSC to adjust its MDQ to reflect changes in ANR's fuel use percentages. The May 23

⁴ ANR Request for Clarification at 4 (citing Contract Nos. 20800 § 3.E and 106324 § 2.C).

⁵ ANR Request for Clarification at 4 (citing Contract Nos. Contract Nos. 5500 § 3.B; 104403 §3.B; 106192 § 3.C; 106179 § 3.E; and 106200 § 3.E).

Order found that ANR must eliminate these provisions as providing WPSC a right to negotiate a change in its MDQ not offered to other shippers in a generally applicable tariff provision.

10. In its request for clarification or rehearing, ANR contends that the MDQ adjustment provision in the two Rate Schedule FSS storage service contracts is offered to all Rate Schedule FSS customers in a generally applicable tariff provision. ANR explains that these provisions are substantively the same as the provision currently found in ANR's *pro forma* service agreement and approved in Docket No. RP01-467-000.⁶ ANR states that this provision is intended to allow a shipper to maintain the same deliveries at its city gate when the amount of fuel that the shipper is required to place into ANR's system changes as a result of changes to ANR's fuel use percentages. ANR states that the purpose of including this provision in these service agreements is to memorialize WPSC's election to avail itself of this tariff right. ANR also states that the Commission accepted a similar MDQ adjustment provision in a storage agreement involving Madison Gas and Electric Company (Madison) based on the fact ANR's tariff offered the adjustment provision on a generic basis.⁷

11. Consistent with our decision in the negotiated rate proceeding involving Madison, since the provision contained in the two storage agreements has been accepted as part of ANR's generally applicable tariff (in Docket No. RP01-467-000), it is available to all qualifying shippers on a nondiscriminatory basis. Accordingly, rehearing is granted on this issue.

2. MDQ Adjustment to Accommodate Capacity on Interconnecting Pipelines

12. ANR states that six of WPSC's transportation contracts contain a provision that is similar in concept, but is adapted to apply to a different circumstance. ANR explains that two of WPSC's transportation contracts have a receipt point at Marshfield, Wisconsin, where ANR interconnects with Viking Gas Transmission Company (Viking). ANR states that it included in these contracts a provision that allows WPSC to reduce its MDQ under these contracts if ANR's fuel use percentages increase. ANR explains that the purpose of this provision is to allow WPSC to match the overall amount of gas it can deliver to ANR at Marshfield (its MDQ plus the in-kind fuel charge) to its upstream

⁶ The Commission conditionally accepted this provision as part of ANR's *pro forma* service agreement in Docket No. RP01-467-000 subject to ANR filing a detailed description of the provision. See 96 FERC ¶ 61,107 (2001). In an unpublished letter order issued on January 23, 2002, the Commission accepted ANR's August 9, 2001 filing as being in compliance.

⁷ See ANR Pipeline Co., 97 FERC ¶ 61,252 at 62,118.

capacity on Viking. Thus, according to ANR, as the fuel requirements on ANR increase, rather than, for example, requiring WPSC to increase its MDQ on Viking to accommodate the additional requirement on ANR, ANR would decrease WPSC's MDQ on ANR, so that WPSC's existing Viking capacity can still accommodate WPSC's maximum entitlement on ANR. ANR states, given that Viking capacity has been fully subscribed, this is the only way that WPSC can accommodate such an increase in ANR's fuel requirement without tying up and paying for capacity that it cannot use.

13. Next, ANR asserts that these provisions would also allow WPSC to make an offsetting adjustment to its MDQ under its other four transportation contracts with receipt points other than at Marshfield. Thus, it explains that, for example, if WPSC's MDQ under its Marshfield ANR transportation contract is decreased due to an increase in the in-kind fuel use charge, WPSC could increase the MDQ under another ANR transportation contract with a different receipt point by the same amount. In this way, ANR contends WPSC is able to maintain the same deliveries at its city gate as before the fuel change.

14. In conclusion, ANR asserts that the provisions in the six WPSC agreements for Rate Schedule ETS transportation service is intended to allow WPSC to adjust its MDQ to accommodate changes in ANR's fuel use percentages. ANR contends that, while it does not have a tariff provision in Rate Schedule ETS similar to that in its storage rate schedule, the provision in the WPSC transportation contracts relates to upstream capacity on Viking. ANR argues that given the unique circumstances surrounding the lack of available capacity on Viking, ANR requests the Commission to accept this provision as a permissible material deviation from ANR's *pro forma* service agreement. ANR states that it will provide the same right to any similarly situated shipper.

15. As the Commission has previously held, contractual provisions that allow a shipper to adjust or redistribute its MDQs during the term of a contract are a valuable right which must be granted in a not unduly discriminatory manner. Accordingly, the Commission has not allowed pipelines to negotiate such provisions with individual customers, unless they are offered in the pipeline's tariff pursuant to generally applicable conditions.⁸ Above, we have approved the provision in WPSC's two storage contracts permitting MDQ adjustments to reflect changes in ANR's fuel retention percentage because ANR's FSS storage rate schedule makes such a right available to all storage customers under generally applicable conditions. However, ANR's ETS transportation rate schedule contains no similar provision offering this type of MDQ adjustment right to all its transportation customers subject to generally applicable conditions. Since ANR states that it is willing to offer the same right to its other similarly situated transportation

⁸ Tennessee Gas Pipeline Co., 97 FERC ¶ 61,225 at 62,029-30 (2001). ANR Pipeline Co., 97 FERC ¶ 61,224 at 62,025 (2001).

customers as it has provided to WPSC, there does not appear to be any reason why it could not include in its tariff a tariff provision offering such an MDQ adjustment right under generally applicable conditions. A tariff filing proposing such a provision would allow the Commission and other interested parties to review the conditions proposed by ANR to ensure that they are not unduly discriminatory. Accordingly, the Commission denies clarification and rehearing with respect to the subject MDQ adjustment provision in WPSC's six transportation contracts.

3. Contractual ROFR

16. Several of the subject service agreements provide that the shipper will have a ROFR under Section 22 of ANR's GT&C, notwithstanding the fact that the shipper may otherwise have been ineligible for this right under Section 22.2. When ANR originally filed the agreements, its tariff provided that all firm shippers with contracts of a year or more would receive a ROFR. Accordingly, in the July 3, 2001 Order, the Commission directed ANR to explain why it considered the shippers in these long-term contracts to be ineligible for a regulatory ROFR.⁹ In response, ANR pointed out that it had filed *pro forma* tariff language in its Order No. 637 compliance filing that would limit the ROFR to maximum rate shippers, unless ANR and the shipper agree otherwise.¹⁰ As a result, shippers under discounted rate or negotiated rate agreements would not be eligible for the ROFR, absent the contractual provision at issue. However, ANR pointed out that one of the service agreements in question (an Allerton Gas Company agreement) provided for the shipper to pay the maximum recourse rate, so that if that contract was not treated as a negotiated rate contract due to the MDQ adjustment provision it contained, then the ROFR provision would be superfluous.

17. The May 23 Order found that, since the Commission had previously accepted the contracts at issue as recourse rate agreements, the shippers would have a ROFR, regardless of the acceptance of ANR's Order No. 637 filing. Accordingly, the Commission directed ANR to remove the ROFR provision in the service agreements as superfluous.¹¹

⁹ 96 FERC ¶ 61,017 at 61,057.

¹⁰ See ANR August 2001 Rehearing at 27 (citing Order No. 637-A, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,099, at pp. 31,634-35 (2000) and citing Fifth Revised Sheet No. 162 of ANR's GT&C filed in Docket No. RP00-332-000 on July 10, 2001).

¹¹ 103 FERC ¶ 61,223 at 61,851.

18. In its request for clarification or rehearing, ANR states that the Commission has not approved all the agreements containing the ROFR provision as maximum recourse rate agreements. ANR states that the ROFR provision is in several agreements, which, unlike the Allerton agreement, provides for either a negotiated or discounted rate. As to those agreements, ANR asserts, the contractual ROFR provision is not superfluous. ANR explains that, but for the contractual ROFR provision, these agreements would not be eligible for a ROFR under ANR's current tariff.

19. ANR made a tariff filing in Docket No. RP03-319-000, revising section 22.2 of its GT&C to clarify that ANR may, in a not unduly discriminatory manner, agree to include a ROFR in a contract that would not otherwise qualify for this right. On June 26, 2003, in an unpublished letter order, the Commission approved revised section 22.2 to be effective May 1, 2003.¹² Consequently, the Commission clarifies that, consistent with ANR's explanation, ANR need not eliminate the contractual ROFR from contracts that would not be eligible for a ROFR pursuant to its tariff absent the contractual provision. Once ANR has identified these affected contracts, ANR is directed to provide a list of the agreements to the Commission.

B. WPSC's Rehearing Request

20. The arguments WPSC raised in its August 2, 2001 request for rehearing have been addressed by the Commission in previous orders, including the arguments raised by ANR that are discussed above.¹³ WPSC generally contends the provisions at issue in the service agreements between it and ANR are consistent with ANR's tariff, the Commission's negotiated rate policies and precedent. The Commission in this and earlier orders has addressed all of the issues raised by WPSC, generally denying rehearing but granting rehearing as to a few issues.

¹² See also ANR Pipeline Co., 103 FERC ¶ 61,084 (2003).

¹³ We will not address those issues in this section of the order since we addressed them above as a part of our discussion of ANR's rehearing request. These issues include provisions giving a shipper the right to: (1) adjust MDQ to reflect changes in ANR's fuel use percentage (2) adjust MDQ to accommodate capacity on interconnecting pipelines and (3) a contractual ROFR. In addition, we will not address WPSC's argument that our conditional acceptance of the agreements at issue is a change in policy which has not been adequately explained. WPSC Request for Rehearing at 20-22. The Commission addressed the same line of reasoning as WPSC expresses in numerous other ANR negotiated rate proceedings. See ANR Pipeline Co., 97 FERC ¶ 61,224 (2001); 98 FERC ¶ 61,170 (2002); 98 FERC ¶ 61,175 (2002) and 100 FERC ¶ 61,348 (2002).

21. Specifically, WPSC argues the provisions permitting WPSC to increase and decrease MDQ are consistent with the Commission's negotiated rate policies.¹⁴ In the May 23 Order, the Commission addressed this same argument. We stated that identical arguments were addressed in a prior ANR negotiated rate proceeding in Docket No. GT01-25-000.¹⁵ Essentially, we concluded that an MDQ adjustment provision is an impermissible negotiated term and condition of service because it presents too much potential for undue discrimination, unless offered pursuant to a generally applicable tariff provision. We noted that ANR now offers MDQ reduction rights through generally applicable tariff provisions.¹⁶

22. WPSC also contended the Commission erred in finding that provisions permitting redistribution of primary points across agreements are impermissible non-conforming provisions.¹⁷ In the May 23 Order, we denied rehearing on this issue, reiterating our finding that special provisions permitting shippers to change a primary point without following the regular tariff procedures could adversely affect other shippers seeking primary point capacity from the pipeline. We concluded that this special right to change primary points is contrary to Commission policy because it would allow the shipper with the special right to have a priority when obtaining the primary point capacity.¹⁸

23. WPSC also sought rehearing of our requirement that ANR remove from the agreement a provision permitting ANR not to seek reimbursement from WPSC in the event of payment default by a replacement shipper.¹⁹ In the May 23 Order, the Commission granted rehearing of this issue because ANR eventually offered this discharge of liability right pursuant to a generally applicable tariff provision.²⁰

24. Next, WPSC raised arguments concerning provisions giving a shipper rights to both gate station aggregation and to certain pressures at various delivery points.²¹ In the

¹⁴ WPSC Request for Rehearing at 7-11.

¹⁵ 103 FERC ¶ 61,223 at 61,849 (citing 97 FERC ¶ 61,224 at 62,021-026).

¹⁶ *Id.* at 61,849-61,850.

¹⁷ WPSC Request for Rehearing at 16.

¹⁸ 103 FERC at 61,850.

¹⁹ WPSC Request for Rehearing at 8.

²⁰ 103 FERC at 61,852.

²¹ WPSC Request for Rehearing at 16.

May 23 Order, we granted rehearing on the issue of the gate station aggregation provision. We also granted rehearing with respect to the provisions concerning pressure levels at various delivery points, consistent with our order on rehearing in ANR's Docket No. RP99-301-029.²² In that order we found that ANR's tariff permits it to agree to minimum pressure levels with its shippers, and therefore the agreement to include such a provision in a contract does not constitute a negotiated term and condition of service.²³

25. We also previously addressed arguments concerning our requirement that ANR demonstrate that the right to enhanced or improved services could not be offered pursuant to generally applicable tariff provisions or remove the provision from the WPSC agreements.²⁴ In the May 23 Order, we found the provision superfluous and therefore directed ANR to remove it from the agreements.²⁵

26. Finally, WPSC contended that the Commission erred in disapproving the contract provisions permitting adjustments to MDQ to account for increases and decreases in fuel charges. As discussed above, the Commission is granting rehearing on this issue with respect to such provisions in WPSC's storage contracts, but denying rehearing with respect such provisions in WPSC's transportation contracts.

The Commission orders:

(A) The requests for rehearing of ANR and WPSC are granted in part and denied in part as discussed above.

(B) Within 30 days of the date of issuance of this order, ANR must refile the agreements with WPSC with revisions necessary to conform to the holdings of this order.

²² 103 FERC ¶ 61,223 at 61,851 (granting rehearing because the right to aggregate gate stations is expressly contemplated by the ETS rate schedule and does not give the shipper a different quality of service than offered all shippers under the rate schedule).

²³ 97 FERC ¶ 61,222 (2001) (granting rehearing because ANR demonstrated that Section 11.2 of its GT&C permits all shippers to negotiate minimum pressure requirements).

²⁴ WPSC Request for Rehearing at 14.

²⁵ 103 FERC at 61,851.

(C) The Commission clarifies that ANR may continue to include the ROFR provision in certain agreements. Once ANR identifies these affected contracts, ANR must file a list of the agreements with the Commission.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.